

Court-Appointed Attorneys for Children

Children are the silent majority of family law litigation. Attorneys for children give voice to their silence and ensure that the court has sufficient information for a custody order based upon the children's best interest. This article summarizes recent legislative changes, seeks to explain when and how attorneys are appointed for children, identifies the primary rights and responsibilities of counsel for minors, and briefly notes some of the difficult problems that arise in the representation of children.

At the outset, we need to recognize the men and women of the bar who have devoted countless hours and great effort in this often-difficult task. They have provided an invaluable public service to the children of divorce. This article is dedicated to them.

RECENT LEGISLATIVE CHANGES

The two basic models of minor's representation are the traditional child's advocate, representing only the wishes and preferences of the child, and the public advocate, representing only the best interest of his or her client regardless of preference. California has adopted a hybrid model combining aspects of both child and public advocate. California Family Code section 3151 now charges court-appointed minor's counsel to represent the child's best interest and, as appropriate, to communicate the child's preferences to the court.

Amendments to former Family Code section 3151 and new Family Code section 3151.5 went into effect on January 1, 1998. According to section 3151, unless inappropriate in a particular case, counsel shall interview the child, review the court file and all accessible relevant records, and investigate as necessary to obtain relevant facts. Also according to Family Code section 3151, at the court's request counsel shall prepare a written statement of issues and contentions. The statement must be filed and submitted 10 days prior to hearing and shall set forth a summary of the information received by counsel, a list of sources of the information, the results of counsel's investigation, and other matters as the court may direct.

The statement of issues and contentions is both an offer of proof and a report to the court. It contains not only the results of counsel's investigation but may also include analysis and recommendations. Any party may subpoena witnesses



Hon. Josanna Berkow

Superior Court of California, County of Contra Costa

Children are the silent majority of family law litigation. The attorneys for children give voice to their silence and ensure that the court has sufficient information for a custody order based upon the children's best interest. This article summarizes recent legislative changes, seeks to explain when and how attorneys are appointed for children, identifies the primary rights and responsibilities of counsel for minors, and briefly notes some of the difficult problems that arise in the representation of children. ■

mentioned in the statement of issues and contentions as having provided information to the child's attorney. However, according to section 3151.5, minor's counsel may not be called as a witness in the proceedings. The written statement shall not contain any confidential communication subject to the lawyer-client privilege within the meaning of Evidence Code section 954. Also according to section 3151, if requested by the court, counsel may state the child's custodial preferences per Family Code section 3042 orally rather than incorporate a stated preference in the written statement.

Children's attorneys may introduce and examine their own witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to represent the client. Counsel has specifically enumerated rights, including reasonable access to the child, standing to seek affirmative relief, notice of any proceeding, the ability to take any action available to a party, access to all of the child's records, the right to notice and refusal of any physical or psychological examination or evaluation unless ordered by the court, the right to assert or waive any privilege on behalf of the child, and the opportunity to seek independent psychological or physical examination upon court's approval. (Section 3151.)

WHEN THE COURT MAY APPOINT A CHILD'S ATTORNEY

The Judicial Council of California has promulgated guidelines for appointment of counsel for minors in sections 20.5 and 20.6 of the California Standards of Judicial Administration. The guidelines predate the recent legislative changes to Family Code sections 3151 and 3151.5. To a certain extent they are redundant but do contain several provisions not embodied in the recent legislation.

Family Code section 3150 permits the court to appoint minor's counsel upon a determination that to do so would be in the minor's best interest. Section 20.5(a) of the Standards of Judicial Administration further specifies that a request for appointment should be considered by the court from any party, parties' counsel, court-appointed mediators and custody evaluators, the guardian ad litem, special advocates, and "any relative of the child." In considering appointment of minor's counsel, section 20.5(b) of the standards suggests that the court consider the following factors:

- (1) whether the dispute is exceptionally intense or protracted;
- (2) whether the child is subjected to stress on account of the dispute which might be alleviated by the intervention of counsel representing the child;
- (3) whether an attorney representing the child would be likely to provide the court with significant information not otherwise readily available or likely to be presented;
- (4) whether the dispute involves allegations that a parent, a step-parent, or other person with the parent's knowledge has physically or sexually abused the child;
- (5) whether it appears that neither parent is capable of providing a stable and secure environment;

- (6) whether the child is capable of verbally expressing his or her views;
- (7) whether attorneys are available for appointment who are sensitive to the needs of children and the issues raised in representing them;
- (8) whether the best interests of the child appear to require special representation.

Children's attorneys are most frequently appointed in high-conflict custody cases. These cases involve protracted and/or exceptionally acrimonious disputes often characterized by multiple modification motions. Generally, there are allegations or other reasons to be concerned about serious parenting deficiencies of either or both parents. Typically, these cases involve allegations of physical or emotional abuse or neglect, sexual molestation, substance abuse, domestic violence, parental alienation, and threats of kidnapping.

Most critically, children's attorneys direct the parents' focus back on their children and away from disputes with each other. The recent revisions to the law recognize the hybrid nature of the role of children's attorneys. They are information gatherers both at the initial stage of the proceedings and in post-trial monitoring roles.

Children's counsel can often provide critical information that would be otherwise unavailable, since these cases often involve pro per parents with little skill in drafting declarations, using subpoenas, or presenting critical evidence to the court.

Another type of case in which children's attorneys are particularly helpful involve children with special needs. Medical conditions, treatment issues, emotional problems, or learning disabilities are the usual problems we see in these cases. Particularly where the parents are self-represented, children's attorneys gather information about available resources and assist families in obtaining them. Minor's counsel can be invaluable in confirming that the child continues to get needed services.

Minor's counsel may also be helpful in proceedings where the child is a potential witness. There are particular benefits in appointing minor's counsel where there are serious allegations of domestic violence or an imbalance of power between the parents so that one may pressure the other into agreements that may be contrary to the children's best interest.

CONTENTS OF THE APPOINTMENT ORDER

In addition, the standards provide guidance on the content of the appointment order, an area left uncovered in the new legislation. Section 20.5(c) provides that the appointment order may specify:

- (1) the issues regarding which the child's representation is ordered;
- (2) any tasks related to the case that would benefit from the services of the attorney;
- (3) the duration of the appointment which may be extended upon a showing of good cause;
- (4) the source of funds and manner of reimbursement for costs and attorney fees.

A copy of the Contra Costa *Orders re Appointment of Counsel for Minor* follows this article. Copies of the appointment order are kept in each family law department.

PAYMENT OF MINOR'S COUNSEL

Family Code section 3153 requires the court to determine the parents' ability to pay minor's counsel fees. If parents are found unable to pay, the county must pay reasonable attorney fees as determined by the court.

OTHER LOGISTICAL ISSUES

Counties need to provide workable procedures for minor's counsel to file requests for waivers of various costs such as court filing fees, copying and discovery costs, transcript costs, and consultation with experts.

According to section 20.5(c)(3) of the standards, the court should also clearly state the term of the appointment of counsel for minors. Generally, once the pending litigation is resolved, counsel may be discharged subject to recall for further litigation as needed.

Family Code section 3152 establishes procedures for the release of relevant records from Child Protective Services agencies concerning the minor for whom counsel has been appointed. The request for release must be on noticed motion, and minor's counsel must maintain the confidentiality of these documents. The court must conduct an in camera review of these records for relevance before ordering their release.

SOME DIFFICULT PROBLEMS

Given the hybrid model of representation of children in California, some children's attorneys will have to determine how to proceed when their assessment of the child's best interest differs from the child's preference. Recent legislative changes have clarified to some degree the options available to these attorneys.

Where the Child's Custodial Preference and Best Interest Diverge

The new legislation has provided much-needed clarification for children's attorneys who find themselves in the difficult position of disagreeing with their client's stated custodial preference. Family Code section 3151 clearly states that court-appointed minor's counsel must represent the best interest of the minor and that counsel should present the minor's preference to the court as well as the reasons for the preference as counsel understands them, along with the reasons counsel believes the stated preference to be contrary to the minor's best interest. In rare cases, counsel may request the appointment of a guardian ad litem where the wishes of the child conflict with the best-interest assessment of minor's counsel. Such appointments are generally disfavored as they increase the complexity of the litigation and may unreasonably delay the proceedings.

The Psychotherapeutic Privilege

Evidence Code section 1013 states that the holder of the psychotherapeutic privilege is the guardian of the patient when he or she has a guardian. Arguably, both parents in a joint legal custody situation may be the minor's guardian within the meaning of section 1013 and may, therefore, be able to assert or waive the minor's privilege regarding confidential communications with a psychotherapist. Again, the new legislation has clarified this issue. Family Code section 3151(c)(7) states that child's attorney has the right to assert or waive any evidentiary privilege on behalf of his or her client. This clearly removes the child's best interest regarding the assertion or the waiver of the privilege from possible subversion by parents enmeshed in a custody battle.

CONCLUSION

Children's counsel are experienced family law attorneys with a working knowledge of juvenile court procedures and possess investigative and mediation skills. As a byproduct of advocacy for their clients, children's attorneys often find resources that benefit the entire family. They often serve as mediators working with all family members toward the best interest of their clients.

Children's counsel often bring about resolution in protracted and complex disputes. Closure is a considerable benefit to families in which all too frequently the war has raged on for years with the children in the center of the conflict. Counsel diverts the parties from focusing on each other's failings and back on the children's needs.

Recent legislative changes have clarified the rights and responsibilities of children's attorneys. Appointment of minor's counsel is one of the most effective tools in resolving difficult custody disputes.

APPENDIX

Superior Court of California, County of Contra Costa STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP: BRANCH NAME:	FOR COURT USE ONLY
PETITIONER / PLAINTIFF: RESPONDENT / DEFENDANT: CLAIMANT:	COURT NUM.
ORDERS RE APPOINTMENT OF COUNSEL FOR MINOR	

FPO - needs high-res scan

1. Date: _____
 Judge (name): _____
☐ Temporary Judge

☐ Petitioner/Plaintiff present ☐ Attorney present (name): _____
☐ Respondent/Defendant present ☐ Attorney present (name): _____
☐ Claimant present ☐ Attorney present (name): _____
☐ Attorney for minor present (name): _____

THE COURT FINDS
 Pursuant to Family Code § 3150(a), it is in the best interest of the minor child to appoint private counsel to represent the interest of the child.

1. Counsel appointed for child: Name _____ Address _____ Telephone number _____
--

2. Child for whom counsel appointed:
 Name _____ Birth date _____ Address _____

3. Pursuant to Family Code § 3151(a), counsel is charged with the following duties:

- a. Interviewing the child;
- b. Reviewing the court files and all accessible relevant records available to the parties;
- c. Making such investigation as counsel deems necessary to ascertain facts relevant to the custody/visitation hearing; and
- d. Participate in the proceedings to the degree necessary to adequately represent the child, including introducing and examining counsel's own witnesses, and presenting to the court concerning the child's welfare.
- e. At the court's request, counsel shall prepare a written statement of issues and contentions setting forth the facts that bear on the best interest of the child consistent with the requirements of § 3151(b).

4. Pursuant to § 3151(c), counsel shall have the following rights regarding the child:

- a. Reasonable access to the child;
- b. Notice of any and all proceedings, including any requested examinations affecting the child;
- c. Access to medical, dental, mental health and other health care records for the child;
- d. Access to school and educational records for the child and the right to interview school personnel, caretakers, health care providers, mental health professionals and others who have assessed the child or provided care to the child;
- e. To veto any physical or psychological examination for purposes of the within proceedings, which has not been ordered by the court (Fam. Code § 3152(b)(4));
- f. To assert on behalf of the child any privilege for discovery purposes (Fam. Code § 3151(b)(5));
- g. The right to seek independent psychological or physical examination or evaluation of the child for purposes of the pending proceedings, upon application to the court and the right to refuse any such examination not ordered by the court;
- h. The right to receive relevant reports and/or files of the local child protective agency, upon the motion to the court (Fam. Code § 3152);
- i. The right to assert or waive any privilege on behalf of the child;
- j. Access to police department records and/or files regarding the child and/or parties;

5. Compensation: ☐ hourly rate \$ _____ ☐ Other (e.g. flat fee) \$ _____ ☐ retainer \$ _____
 Paid: ☐ Reserved, parties to file Income & Expense Declaration in 20 days.
☐ _____ % Petitioner, _____ % Respondent

6. Counsel shall continue to represent the child unless relieved by the court, upon substitution of other counsel by the court, for cause, or until (date): _____

Date: _____

JUDGE / COMMISSIONER

FAMLAWS013-25-98